IN THE
SUPREME COURT OF MISSOURI

No. SC90085

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant,

v.

STEVE AND ANITA RITCHIE,

Respondents.

Appeal from the Circuit Court of Jasper County
Case No. 05ACO-CC00402
The Honorable David Mouton

BRIEF OF AMICUS CURIAE

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I. INTEREST OF AMICUS CURIAE

The Missouri Insurance Coalition ("MIC") is a not-for-profit state trade association providing governmental and public relations representation for insurance companies and affiliated entities operating in the state of Missouri. Its members write approximately 90% of the motor vehicle insurance policies in this state. The MIC represents the insurance industry on insurance-related matters before the legislative, executive and judicial branches of government in Missouri. A number of the MIC's member companies have contacted the MIC regarding the Southern District's opinion in this case. That opinion, which found Allied's policy to be ambiguous despite Missouri law supporting the policy language in question, has caused substantial confusion and concern on the part of the MIC and its member companies.

II. SUMMARY OF ARGUMENT

Underinsured motorist coverage is distinct and separate from uninsured motorist coverage. Uninsured coverage is mandated by statute and public policy requires that such coverage be permitted to be "stacked." By contrast, underinsured coverage is not mandated by statute or public policy and therefore the language of the insurance contract controls. Insurance companies doing business in Missouri are free to prohibit stacking of underinsured coverage with appropriate policy language.

Allied's insurance policy contains the appropriate language, is unambiguous, and should be construed to prohibit stacking coverage on each of the three vehicles listed in the Declarations page of Allied's policy. The Southern District Court of Appeals erroneously concluded that a conflict between the "Other Insurance" clause of Allied's policy and the "Limit of Liability" clause created an ambiguity which permitted stacking. In reality, the Other Insurance clause should not even have been considered by the lower court since it expressly stated in plain language that the clause was triggered only if there was other UIM coverage. And even if for some reason the Other Insurance clause is considered in the analysis, the Allied policy is still unambiguous and should be enforced to prohibit stacking. The Allied policy language tracks that of the Farm Bureau policy as analyzed in *Farm Bureau Town & Country Insurance Company of Missouri v. Barker*, 150 S.W.3d 103 (Mo. App. W.D. 2004), and heeds suggested policy language of decisions relied upon by both Respondent and the lower court.

Allowing the Southern District's opinion to stand would create ongoing confusion and expense for companies that do business in our state. The opinion of the lower court fails to distinguish *Barker*, is inconsistent in its holding on the issue of stacking and set-off, and should be reversed by this Court in order to provide consistency and direction to Missouri insurers.

III. ARGUMENT

A. Law Governing Construction of Insurance Contracts

This case deals with underinsured motorist coverage ("UIM"). In Missouri, such coverage is not mandated by statute and the parties are free to contract as to the limits of coverage. *Noll v. Shelter Insurance Companies,* 774 S.W.2d 147, 151-152 (Mo. banc 1989); see also *Rodriguez v. General Accident Insurance Company of America,* 808 S.W.2d 379, 383 (Mo. banc 1991). For this reason, the existence of the coverage and its ability to be stacked or not are determined by the contract entered into between the insured and the insurer. *Rodriquez,* 808 S.W.2d at 383. This stands in stark contrast to *uninsured* motorist coverage which is mandated by Missouri's Motor Vehicle Financial Responsibility Law. *Noll,* 774 S.W.2d at 151-152. Unlike uninsured coverage, with underinsured coverage there are no public policy considerations and the insured and insurer are free to define and limit the coverage by their agreement. *Rodriguez,* 808 S.W.2d at 383.

When looking at the language of an insurance policy, a court does not isolate ambiguous phrases, but rather reads the policy as a whole giving every clause some meaning if it is reasonably able to do so. *Mazzocchio v. Pohlman,* 861 S.W.2d 208, 210-211 (Mo. App. E.D. 1993). Whether an insurance policy is ambiguous is a question of law. *Gulf Insurance Company v. Noble Broadcast,* 936 S.W.2d 810, 813 (Mo. banc 1997). Provisions in an insurance policy are ambiguous when, due to duplicity, indistinctness, or uncertainty in the meaning of the words used, the policy is reasonably

open to different constructions. *Krombach v. Mayflower Insurance Company,* 827 S.W.2d 208, 210 (Mo. banc 1992). Courts are not authorized, however, to pervert language in the policy or exercise inventive powers for the purpose of creating an ambiguity when none exists. *State Farm Mutual Automobile Insurance Company v. Ward,* 340 S.W.2d 635, 639 (Mo. 1960) (citations omitted). "A court is not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate." *Rodriguez,* 808 S.W.2d at 382. Furthermore, when an insurance policy is unambiguous, it will be enforced as written absent a statute or public policy requiring coverage. *Id.* (citing *Hempen v. State Farm Mutual Automobile Insurance Co.,* 687 S.W.2d 894 (Mo. banc 1985)).

Appellant Allied's insurance policy contained anti-stacking language which unambiguously precluded stacking of the UIM policy limits. Furthermore, and as will be described more fully below, there was no legitimate basis for the Southern District Court of Appeals to conclude that an ambiguity existed which would nullify the anti-stacking language of Allied's policy.

B. The Language of the Other Insurance Clause is Inapplicable and Should Not Be Considered

Allied's insurance policy contains the following provision relating to Other Insurance in its policy language dealing with UIM coverage:

B. The Other Insurance provision is amended to read as follows:

If there is other applicable underinsured motorists coverage available under one or more policies or provisions of coverage:

1. Any recovery for damages may equal but not exceed the highest applicable limit for any one vehicle under this insurance or other insurance providing coverage on either a primary or excess basis. In addition, if any such coverage is provided on the same basis, either primary or excess, as the coverage we provide under this endorsement, we will pay only our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits for coverage provided on the same basis.

2. Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage. (L.F. 350).

In examining the above language, the Court of Appeals performed an extensive analysis of the Other Insurance language in three appellate court cases in order to conclude that the provisions within Allied's Other Insurance section are ambiguous as to whether the coverage is stackable.[1] A closer reading of Allied's policy demonstrates,

[1] The Missouri Court of Appeals for the Southern District reviewed the cases of *Niswonger v. Farm Bureau Town & Country Insurance Company of Missouri*, 992 S.W.2d 308 (Mo. App. E.D. 1999); *American Family Mutual Insurance Company v. Ragsdale,* 213 S.W.3d 51 (Mo. App. W.D. 2006); and *Chamness v. American Family Mutual Insurance Company,* 226 S.W.3d 199 (Mo. App. E.D. 2007).

however, that the lower court's examination of the Other Insurance language was unnecessary. The very first sentence of Allied's Other Insurance clause states: **If *there is other applicable underinsured motorist coverage available under one or more policies or provisions of coverage . . .*** (emphasis added). This plain language reflects that the Other Insurance clause only applies in the event there is "other applicable underinsured motorist coverage." In the present case, there was no other applicable UIM coverage, so Allied's Other Insurance clause should not even have been considered by the appellate court. It would apply only in the event there was other applicable UIM coverage, and since none existed, the Other Insurance clause does not factor into the analysis and should not be used to artificially create an ambiguity under the policy.

The result is a much simpler analysis. Because the Other Insurance language of the policy does not come into play, one need only look at the Limit of Liability language of the Allied policy to determine whether or not the UIM coverage may be stacked. That provision states as follows:

> LIMIT OF LIABILITY
>
> The limit of liability shown in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit of liability for all damages for "bodily injury"

resulting from any one accident. This is the most we will pay regardless of the number of:

1. "Insureds";

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the accident.

This endorsement must be attached to the Change of Endorsement when issued after the policy is written. (L.F. 355).

Under these circumstances, the *Rodriguez* case is most applicable. In *Rodriguez*, plaintiffs argued they should be permitted to stack UIM coverage on each of their two vehicles insured by General Accident Insurance Company's policy thereby yielding a combined limit of $100,000 ($50,000 each). *Rodriguez*, 808 S.W.2d at 383. The policy at issue contained the following language:

LIMIT OF LIABILITY

A. The limit of liability shown in the schedule for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:

1. "Insureds";

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the accident.

> However, the limit of liability shall be reduced by all sums paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under part A of this policy. *Rodriguez,* 808 S.W.2d at 381.

In rejecting the plaintiffs' argument, the *Rodriguez* court explained that the General Accident policy did not treat underinsured coverage as though it were uninsured coverage and there was therefore no public policy mandating anti-stacking. It held that the language of the anti-stacking provisions of the policy in question were clear and unambiguous, and would be enforced in the absence of public policy requirements mandating underinsured motorist coverage. *Id.*

Although not identical, the Limit of Liability language contained in Allied's policy closely resembles that found in *Rodriguez.* Like *Rodriguez,* the Allied Limit of Liability language states in plain terms the maximum amount that will be paid regardless of the number of insureds, claims made, vehicles or premiums shown in the Declarations, or vehicles involved in the accident. The only difference is that the Allied policy breaks down the limit of liability maximums into the "per person" and "per accident" limits of liability. As such, the Allied policy is actually *more detailed* than the policy at issue in *Rodriguez* and therefore unambiguously prohibits stacking.

C. Even if the Other Insurance Clause is Considered in the Analysis, Allied's Policy is Not Ambiguous and Should be Enforced to Prohibit Stacking

1. The Language of Allied's Other Insurance Clause Dealing With a Non-Owned Automobile is Completely Distinguishable From Policy Language Upon Which the Appellate Court Relied, Which Included Use of the Words "However" and "But" and Failed to Specifically Reference "Underinsured" Coverage

The Southern District primarily relied upon three cases to reach the erroneous conclusion that the Other Insurance clause of Allied's insurance policy was ambiguous as to whether UIM coverage was stackable. Those three cases are *Niswonger v. Farm Bureau Town & Country Insurance Company of Missouri*, 992 S.W.2d 308 (Mo. App. E.D. 1999); *American Family Mutual Insurance Company v. Ragsdale*, 213 S.W.3d 51 (Mo. App. W.D. 2006); and *Chamness v. American Family Mutual Insurance Company*, 226 S.W.3d 199 (Mo. App. E.D. 2007).

In particular, the Southern District focused on the second sentence of the Other Insurance clause to reach its conclusion. The second sentence of the Other Insurance clause in Allied's policy reads as follows:

> Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible ***underinsured*** motorist coverage (emphasis added).

Contrast Allied's policy language with that utilized in the second sentence of the Other Insurance clause utilized by the insurance carriers in *Niswonger, Ragsdale* and *Chamness*:

Niswonger:

> ***However***, any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any other similar insurance. *Niswonger*, 922 S.W.2d at 315 (emphasis added).
>
> *Ragsdale:*
>
> ***But***, any insurance provided under this endorsement for an insured person while occupying a vehicle you do not own is excess over any other similar insurance. *Ragsdale*, 213 S.W.2d at 54 (emphasis added).
>
> *Chamness*:
>
> ***But***, any insurance provided under this endorsement for an insured vehicle you do not own is excess over any other similar insurance. *Chamness*, 226 S.W.3d at 201 (emphasis added).

There are two patently obvious differences between the language utilized in the Allied policy and that utilized by the policies examined in the other three cases. First and foremost, the Allied policy does not use the word "however" or "but" to begin the second sentence of the Other Insurance clause. And second, the Allied policy specifically refers to insurance provided for a non-owned vehicle as excess over any other collectible ***"underinsured"*** motorist coverage.

The very cases relied upon by Respondent and the Southern District make it clear that these two distinct differences are the keys to determining whether Allied's clause is ambiguous. For example, *Niswonger* specifically states that the fact that the sentence begins with the word "However" suggests, and could easily be interpreted by a lay person to mean, that it prevails and takes precedence over the policy's prior anti-stacking

language whenever the accident is one where the insured was occupying a non-owned vehicle. *Niswonger*, 992 S.W.2d at 316. *Niswonger* goes on to explain in a footnote that the word "However" in a contract is a word of exclusion, indicating an alternative intention, a contrast with a previous clause and a modification of it under other circumstances. *Niswonger* 992 S.W.2 at 316, fn. 7 (citations omitted).

Likewise, the policies involved in both *Ragsdale* and *Chamness* started the second sentence of the Other Insurance clause with the word "But," thereby separating it from the rest of the paragraph in exactly the same fashion as use of the word "However." Not surprisingly, both *Ragsdale* and *Chamness* found that the second sentence of the Other Insurance clause at issue created an ambiguity. *Ragsdale*, 213 S.W.3d at 56; *Chamness*, 226 S.W.3d at 207.

The holding of these courts that an ambiguity existed was further bolstered by the fact that none of the Other Insurance clauses referred directly to "other underinsured motorist coverage." Indeed, both *Ragsdale* and *Chamness* discuss the failure of the policies involved to simply state that the second sentence of the Other Insurance clause was referring to "other similar underinsured motorist insurance." *Ragsdale*, 213 S.W.3d at 56; *Chamness*, 226 S.W.3d at 206. As stated by *Ragsdale*: "If American Family intended *similar* to mean *other underinsured motorist insurance*, it simply could have stated *other similar underinsured motorist insurance*." *Id.* This identical language plus two full paragraphs of rationale supporting it were quoted in their entirety in *Chamness*. See 226 S.W.3d at 206. *Ragsdale* followed *Niswonger*, *Chamness* followed *Ragsdale*,

and none of these cases is remotely on point when considering the policy language in this case.

By foregoing use of the words "However" or "But," and by referring directly to underinsured motorist insurance, Allied has eliminated the ambiguity criticized by prior Missouri case law. This conclusion is supported by the case of *Green v. Federated Mutual Insurance Company*, 13 S.W.3d 647 (Mo. App. E.D. 1999). That decision contained Other Insurance language similar to Allied's which stated: "Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist insurance providing coverage on a primary basis." *Green*, 13 S.W.3d at 647. In determining that the policy language utilized by the insurer in *Green* was not ambiguous, the court compared the Other Insurance clause to cases which utilized the flawed language beginning with "However" and which referred only to the insurance being provided as excess over any other collectible insurance. *Id*. at 648. *Green* went on to conclude that the insurer had eliminated any ambiguity because its language clearly stated that the UIM coverage it provided was excess ***over only other UIM insurance***, not excess over other collectible insurance of any kind. *Id.*

Finally, *Farm Bureau Town & Country Insurance Company of Missouri v. Barker* also provides support for Allied's position that their policy was not ambiguous and that the anti-stacking provisions of the policy should be enforced. *Barker*, which was ignored by the Southern District in this case, dealt directly with whether Farm Bureau's anti-stacking provisions were clear and unambiguous thereby precluding stacking of the per person UIM policy limits. *Barker*, 150 S.W.3d at 106. The plaintiffs in *Barker* relied

upon *Niswonger* in attempting to argue that Farm Bureau's Other Insurance clause created an ambiguity. *Id.* at 107. Farm Bureau's policy stated as follows:

> OTHER INSURANCE
>
> If there is other applicable insurance available under one or more policies or provisions of coverage:
>
> A. Any recovery for damages under all such policies or provisions of coverage may equal, but not exceed, the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.
>
> B. Any insurance **we** provide with respect to an vehicle **you** do not own will be excess over any collectible insurance providing coverage on a primary basis.
>
> C. If the coverage under this policy is provided:
>
> 1. On a primary basis, **we** will pay only **our** share of the loss that must be paid under insurance providing coverage on a primary basis. **Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable Limits of Liability for coverage provided on a primary basis.
>
> 2. On an excess basis, **we** will pay only **our** share of the loss that must be paid under insurance providing coverage on an excess basis. **Our** share is the proportion that our Limit of Liability

bears to the total of all applicable Limits of Liability for coverage provided on an excess basis. *Barker*, 150 S.W.3d at 107.

The full language of Allied's Other Insurance provision is very similar to the language contained in Farm Bureau's policy. Essentially, paragraph 1 of Allied's policy combines the language of paragraphs 1 and 2 under subpart C of Farm Bureau's policy, which relates to proportionate sharing on a primary or excess basis (see Allied policy language, *supra*, p. 5-6). In addition, the first sentence under paragraph 1 of Allied's Other Insurance clause is nearly identical to paragraph A of Farm Bureau's Other Insurance clause. The real difference between the policies comes with respect to the language governing a non-owned automobile. The Farm Bureau policy stated: "Any insurance we provide with respect to a vehicle you do not own will be excess over any collectible insurance providing coverage ***on a primary basis.*** *Barker*, 150 S.W.3d at 107 (emphasis added). The Allied policy instead references its coverage being excess over "any other collectible ***underinsured motorist coverage***."

Given that the Allied policy omitted the word "However" or "But" from subpart 2 of its other insurance provision dealing with a non-owned vehicle, the plain language interpretation of the policy can only be that any UIM coverage Allied provides with respect to a non-owned automobile is excess over any ***other collectible UIM coverage.*** This clause should not be read in isolation or rendered distinct from paragraph 1 which directly limits damages under the UIM coverage to the highest applicable limit for any one vehicle under the insurance. Nor should Missouri courts be allowed to warp the policy language in an effort to create an ambiguity.

Rather, the MIC as Amicus urges this Court to settle the confusion created by the Southern District and hold that the Allied policy language is not ambiguous. As in *Barker*, the sentence which was found to be offensive in *Niswonger* is not present in Allied's UIM endorsements, but instead was replaced by entirely different language which is very similar to that contained in the Farm Bureau policy. The *Barker* court reasoned:

> In particular, we think Section A, which was simply not present in the UIM endorsements construed in *Niswonger*, dispels the ambiguity and potential confusion found in the *Niswonger* policy. Section A makes it perfectly clear that whether the other applicable UIM insurance is considered primary or excess coverage, any recovery from Farm Bureau for damages under all such policies may not exceed the highest applicable limit for any one vehicle. That is to say, far from introducing any ambiguity when there is a covered accident involving a non-owned vehicle, as was found to be the case by the *Niswonger* majority, the UIM endorsement here actually reiterates and reinforces the provisions of the unambiguous anti-stacking clause found in the "GENERAL PROVISIONS" section of both of the Barkers' policies. To hold otherwise would be to distort the plain meaning of the language in the policies and to create an ambiguity where none exists. *Barker*, 150 S.W.3d at 108.

Along the same line, the Other Insurance language contained in Allied's policy reinforces the anti-stacking clause found in the Limit of Liability section. A contrary

holding distorts the plain meaning of the language in the policy and is an effort to create an ambiguity where none exists.

D. Impact of the Southern District's Decision on the Insurance Industry in Missouri

The decision of the Southern District in this case has caused a substantial deal of confusion and uncertainty for the member insurance companies of the Missouri Insurance Coalition. Not only does the opinion of the Southern District lack any explanation as to why the reasoning of *Barker* is not applicable, it is also inherently confusing and contradictory: It relies on *Green* to permit a set-off for payments made by the negligent tortfeasor on the one hand, yet refutes the reasoning set forth in *Green* in order to find an ambiguity and allow for stacking on the other hand. The Southern District's opinion recognizes that Allied's excess clause specifically refers to "underinsured motorist coverage" when the court discusses set-off, yet the opinion never discusses the impact of this specific reference to UIM coverage in the court's explanation of why the anti-stacking provisions of Allied's policy should not be enforced.

The UIM excess clause at issue here ***only*** applies in the event that there is "other applicable underinsured motorist coverage available . . ." This necessarily requires some policy ***other than Allied's*** which actually provides UIM benefits. Any other interpretation of this section would require a court to ignore the word "other" and instead make a concerted effort to create an ambiguity where none otherwise exists.

Webster's Dictionary defines the word "other" as follows:

> 1a: being the one (as of two or more) remaining or not included <held on with one hand and waived with the *other one*> b: being the one or ones distinct from that or those first mentioned or implied <taller than the *other* boys> c: SECOND <every *other* day>
>
> 2: not the same: DIFFERENT <any *other* color would have been better> <something *other* than it seems to be>
>
> 3: ADDITIONAL <sold in the US and 14 *other* countries>
>
> 4a: recently passed <the *other* evening> b: FORMER <in *other* times>
>
> *Webster's Ninth New Collegiate Dictionary*, 1990 by Merriam-Webster, Inc., p. 835.

The most obvious meaning for the word "other" in the context of Allied's policy is ***different or additional*** uninsured motorist coverage. Regardless of how one attempts to construe the non-owned automobile clause, there is simply no justification for ignoring the plain language of Allied's policy which requires there to be other (different or additional) UIM coverage before this portion of the policy is even triggered.

The MIC has determined that a number of member insurance companies heeded the advice provided by our appellate courts in *Barker* and *Ragsdale*, and modified their policies in order to adopt anti-stacking language in an effort to follow those cases. These carriers wrote their policies and calculated premiums for UIM coverage with the understanding that the anti-stacking language cited with approval in *Barker* would be enforced here in Missouri. If the Southern District's opinion in the present case is allowed to stand, then all claims currently pending or in litigation plus additional claims

filed under these insurance policies will result in increased liability limits not originally contemplated by the insurance contracts at issue.

The cost to insurers due to this unforeseen, increased liability will be substantial. For example, in the present case, Allied's liability was increased more than six times, from $40,000 to $260,000 when the three vehicles listed in the policy were allowed to be "stacked" despite unambiguous policy language to the contrary. Going forward, this type of additional substantial risk would be unfairly placed on Missouri insurers despite the fact that such a high degree of risk was not originally contemplated by their contracts of insurance. In addition, insurance carriers will be forced to reconsider the anti-stacking language for UIM coverage in their policies. The cost for insurers to reprint policies or add additional endorsements in an attempt to clarify this coverage would also be substantial. The inefficiency of this process, along with the uncertainty as to the enforceability of anti-stacking language utilized in insurance policies in this state, could be avoided by this Court reversing the decision of the Southern District on this point and confirming that the language of the Allied policy was unambiguous and did not permit stacking of UIM coverage.

IV. CONCLUSION

Allied's insurance policy governing this case is not ambiguous. The actual policy language utilized for the Other Insurance section is highly analogous to that approved by *Barker* when that court examined Farm Bureau's Other Insurance clause. In addition, Allied's language specifically references "other underinsured motorist coverage" which must exist before the Other Insurance section is even triggered.

Allied's Limit of Liability language contained in the policy makes it clear that UIM coverage cannot be stacked. The MIC and its members encourage this Court to reverse the underlying decision which permitted stacking, to find that Allied's policy was unambiguous, and to hold that the policy in question prohibited stacking and allowed for a set-off for payments made by the negligent tortfeasor. Both the plain language of Allied's policy and on-point Missouri case law support such a finding.

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Certificate of Compliance with Rule 84.06(c)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that, beginning with the Table of Contents and concluding with the last sentence before the signature block, the brief contains 4,655 words. The word count was derived from Microsoft Word 2007.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that a complete copy of the foregoing was sent by first-class mail, postage prepaid, this 15th day of June, 2009, to:

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